Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October, Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, Ex Rel.
MARGIE R. PHELPS - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

October, Term, 1976

No. _____

RAYMOND MAYFIELD - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, EX. REL. MARGIE R. PHELPS - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

The petitioner, Raymond Mayfield, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Kentucky Supreme Court.

OPINION BELOW

The opinion of the Kentucky Supreme Court, 546 S. W. 2d 433, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Kentucky Supreme Court was rendered on October 29, 1976. A timely petition for rehearing was overruled on March 11, 1977. This Peti-

tion for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the decision of the Kentucky Courts, in refusing to vitiate an Agreement of Paternity and Support, entered into by the petitioner and respondent, denies to the petitioner certain rights guaranteed him under the Fourteenth Amendment to the United States Constitution, which denounces the taking of property without due process of law and further denounces the failure to provide persons with equal protection of the laws.

CONSTTTUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States of America provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This litigation involves an award Judgment increasing child support payments for a child which was born out of wedlock to the respondent, Margie R. Phelps, on or about September 15, 1973. On January 18, 1974, in a paternity action pending before the Juvenile Division of the Jefferson County Kentucky Court, the petitioner and respondent entered into an Agreed Order, approved by the Judge of that Court, wherein the petitioner acknowledged paternity of the child and agreed to make Ten ($10.00) Dollar weekly support payments upon the respondent's agreement to forebear continued proceedings in that action. Thereafter, on November 4, 1974, by oral motion, the Respondent sought to increase the support payments for the child. A Juvenile Court Trial Commissioner overruled the motion on the basis that there was no showing of a change of circumstances since the date of the agreement.

The respondent appealed the ruling of the Juvenile Court to the Jefferson Circuit Court, Chancery Branch, where the matter was bifircated to the extent that hearings were held on the question of whether the Agreed Order was essentially a contract and therefore binding, as such, upon the parties, and secondly, whether there was, in fact, a change of circumstances, which would allow an increase in the support payments. In both instances, the Commissioner of the Jefferson Circuit Court, and subsequently the Circuit Court itself, found for the respondent. From these rulings an appeal was taken to the Kentucky Supreme Court, the State's highest Court, which affirmed the decision of the lower

court. That decision made only an oblique reference to the contractual question involved and decided the case on the basis that a father owes the same duty to support a child born out of wedlock as he does to a child born in wedlock, even though this latter principle of law was not in dispute during any of the proceedings.

REASONS FOR GRANTING THE WRIT

The petitioner wishes to state at the outset that he is not arguing or challenging the rights of an illegitimate child to support from an errant father or the fact that maintenance for that child should be no different than that of a legitimate child. The law of Kentucky is clear on that point as expressed in Kentucky Revised Statutes §406.011. Moreover, that statute has been reinforced by the decision of this Court in *Gomez* v. *Perez*, 490 U. S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973). Further, the general concept that an illegitimate child has the same rights as those of a legitimate child has been decided in other areas of the law as well, e.g., *Levy* v. *Louisiana*, 391 U. S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); *Glona* v. *American Guarantee and Liability Insurance Company*, 391 U. S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968) and the recent decision of this Court in *Trimble* v. *Gordon*, —— U. S. ——, 97 S. Ct. 1459, —— L. Ed. 2d ——, 45 Law Week 4395 (1977) to cite only a few.

It is the petitioner's contention, however, that he entered into a contractual situation whereby, *through compromise*, he admitted paternity of the child, Mia Janeen Phelps, on January 18, 1974 in order to bring

about a *final* resolution of this matter. That contract, taking the form of an Agreed Order, was to completely resolve the issues between the petitioner and respondent, and for this Court's convenience, is set out as follows:

MARGIE R. PHELPS - - - - - *Plaintiff*

v.

RAYMOND MAYFIELD - - - *Defendant*

AGREED ORDER

* * * * * * *

Comes the Plaintiff, Margie R. Phelps, in person and by counsel, Walter J. Swyers, Jr., and the Respondent, Raymond Mayfield, in person and by counsel, Cecil A. Blye, Sr., and it is agreed as follows:

1. That Defendant is the father of Mia Janeen Phelps, born to Plaintiff, September 15, 1973, in Louisville, Jefferson County, Kentucky.

2. That Plaintiff has, and shall continue to have, exclusive custody of said Mia Janeen Phelps.

3. That Defendant agrees to pay or cause to be paid to this Court the sum of $10.00 per week for care, support and education of said Mia Janeen Phelps from September 15, 1973 until further order of this Court. The amount of arrearage from September 15, 1973 until the date of this Agreed Order shall be paid by Defendant to Plaintiff, in lump sum, on the date of this Agreed Order, or within 60 days therefrom.

4. That Plaintiff agrees to forebear continued proceedings in this action, but, in the event of De-

fendant's failure to fulfill the . ligations of this Agreed Order, Plaintiff retains the right to pursue a satisfactory remedy in this action.

/s/ _____
JOSEPH RAY

1-18-74
DATE

Agreed to:

/s/ _____
Margie R. Phelps,
Plaintiff

/s/ _____
Walter J. Swyers, Jr.
Attorney for Plaintiff

/s/ _____
Raymond Mayfield,
Defendant

/s/ _____
Cecil A. Blye, Sr.
Attorney for Defendant

The Kentucky Courts, by their interpretation of this Agreed Order, have allowed the petitioner to be hoisted upon his own petard by ruling that they are going to sanction and hold him to his admission of paternity but are going to allow the respondent to wiggle out of her agreement to forebear any further proceedings in the matter subsequent to the entry and court approval of the Agreed Order. By this interpretation the petitioner contends that the Kentucky Courts are denying him both the due process and equal

protection of the laws guaranteed him under the Fourteenth Amendment to the United States Constitution by taking from him more property, in the form of money, then he had contracted to relinquish.

The Petitioner anticipates that an argument will be raised concerning the phrase in paragraph 3 of that Agreed Order, which states in pertinent part that child support payments will be made from September 15, 1973 *"until further order of this Court"*. Presumedly the argument will be that this phrase leaves the maintenance question open for future modification by the Court under the theories of *Renick* v. *Renick,* 57 S. W. 2d 663 (Ky., 1933); *Richey* v. *Richey,* 389 S. W. 2d 914 (Ky., 1965); *Warner* v. *Ward,* 401 S. W. 2d 62 (Ky., 1966). The petitioner respectively calls this Court's attention to the fact that the children involved in the litigation of these cases were unquestionably the children of the litigants and the Court's decision in these cases were primarily grounded in statutory law that is particularly applicable to divorce proceedings KRS 403.070. See also *Ullman* v. *Ullman,* 302 S. W. 2d 849 (Ky., 1957).

The petitioner believes that there is an entirely different perspective here because of the particular language of paragraph 4 of that Agreed Order, which sets out that the respondent agreed *"to forbear (sic) continued proceedings in this action"* except in the event that the petitioner failed to fulfill his obligations. This proceeding, at its very inception, was a paternity action wherein the petitioner was accused of fathering the child, Mia Jeneen Phelps. Specifically *through com-*

promise, as evidenced by the Agreed Order of January 18, 1974, the petitioner agreed to acknowledge fathering the child, and further agreed to pay a set amount of Ten ($10.00) Dollars per week in support of that child in return for the respondent agreeing to forever forebear continued proceedings in the action. All of which simply means that the intention of the parties was that the matter be forever finalized for any other type of court action except as might result from the petitioner's failure to comply with the Agreed Order.

The respondent through her motion to increase the support payments for the child in the Juvenile Court and the Jefferson Circuit Court, seeks to have the best of both possible worlds. On the one hand, through negotiation and compromise, the respondent was able to have the petitioner accept and acknowledge paternity by an agreement, in which the petitioner effectively gave up his trial rights in the paternity proceeding that was pending before the Juvenile Court. In that agreement the respondent agreed to no further or continued proceedings. However, on the other hand, the respondent, through her actions, sought to utilize the very instrument of compromise to further litigation against the petitioner. The petitioner urges to this Court that the furtherance of such actions goes against the very nature of contract law in respect to the finalization of the action, which was obviously his intention upon the execution of that agreement.

The petitioner believes that this is a case of first impression before this Court. He further recognizes that other jurisdictions have held that a mother of an

illegitimate child cannot contract away support payments. *Walker* v. *Walker*, 266 So. 2d 385 (Fla., 1972); *State* v. *Bowen*, 498 P. 2d 877 (Wash., 1972). However, these cases are not directly on point.

Since the petitioner readily admits that the rights of an illegitimate child are the same as those of a legitimate child, it follows that he also agrees that the child's rights cannot be relinquished by this agreement, since the child was not a party. But that theory of law applies to an isolated question of increased maintenance, not to the initial and essential question of admitted paternity through a *compromise* agreement.

Raymond Mayfield admitted paternity through a *compromise* settlement and agreed to maintenance in a specific amount for Mia Janeen, in return for which Margie Phelps agreed to forebear any further action. But Margie did not abide by the terms of her agreement and as a consequence the petitioner sought to have the agreement set aside so that he could be restored to the position that he was in immediately prior to the signing of the agreement in question.

If this Agreed Order was not a contractual agreement, what then was it? There obviously was an offer and an acceptance—and each side suffered legal detriments. There was good consideration—a swapping of money for forebearance of any further action. Consequently, the Agreed Order of January 18, 1974 seems to fit within the generally accepted parameters of contractual theories. Yet, The Kentucky Court by its decision in this case virtually endorses the breach of that contract. Raymond is penalized for not breaching

the agreement and Margie is all but applauded for breaching it.

It seems that under almost any theory of contract law, Raymond should be restored to his original position immediately prior to entry of the January 18, 1974 agreement, especially since he is not the offending party to the breach. Since neither the law nor Margie is going to allow the payment of Ten ($10.00) Dollars child maintenance to stand, Raymond should be restored to his position of being only accused of paternity —his position before he agreed to *compromise.*

The petitioner believes the Kentucky Court, in its opinion, erroneously stated that Raymond's theory was not supported by law. Quite the contrary, Sidney B. Schatkin's excellent two volume treatise entitled *Disputed Paternity Proceedings,* published by the Matthew Bender Company (1975), addresses itself to that point. On the possible chance that Mr. Schatkin's treatise is not available to this Court, the petitioner prays the Court's indulgence for liberally quoting from the section on Compromise and Settlement. Schatkin, at pp. 12.33-34 states as follows:

> It often occurs, especially after the blood test which has resulted inconclusively, that the respondent will admit paternity, and consent to the entry of a filiation order, conditioned upon, and provided that, a modest support order be entered. In Cohen v. Berlin, 37 A. D. (2d) 567, 323 N. Y. Supp. (2d) 815, at Family Court, New York County, Respondent acknowledged paternity on December 30, 1969, and a modest support order of $10 per week was made, which modest order was the condition

of his admission of paternity. Thereafter, petitioner made a motion for an increase, and on July 21, 1970, the Family Court increased the support order to $30 per week. Respondent appealed to the Appellate Division, Second Department, which reversed the order of July 21, 1970, vacated the filiation order, permitted a withdrawal of the admission of paternity, and restored respondent to his original position before he admitted paternity.

This is an extremely important decision. For, if respondent admits paternity conditioned on the fixing of a certain weekly support order (usually modest) and thereafter petitioner seeks an increase, and an increase is granted, on appeal, in view of Cohen v. Berlin, the proceedings leading up to, and including the admission of paternity, may be vacated and set aside. The Appellate Division's opinion follows in full:

> "ARLENE C. ANONYMOUS, res. v. STEPHEN B. ANONYMOUS, ap—In a paternity proceeding the appeal if from an order of the Family Court, Richmond County, dated July 21, 1970, which modified a prior order of support dated Dec. 30, 1969, by increasing the amount directed to be paid for support of the child from $10 per week to $30 per week, with leave to petitioner to seek further modifications on showing of a change in circumstances.
>
> "Order dated July 21, 1970, reversed, on the law, without costs, and matter remanded to the Family Court for further proceedings not inconsistent herewith.
>
> "Petitioner commenced a paternity proceeding to have appellant declared the father of her out-of-wedlock child born on April 11, 1969. The parties reached an agreement pursuant to section 516 of

the Family Court Act under which appellant admitted paternity and agreed to make modest support payments. Separate orders of filiation and support were made and entered on Dec. 30, 1969. Petitioner thereafter successfully sought an increase in support payments, which resulted in the order of July 21, 1970.

"An examination of the records of the Family Court and the hearing minutes of Dec. 30, 1969, wherein appellant admitted paternity and agreed to a support order, does not reveal that notice of the support agreement was given to the public welfare officials as required by subdivision (b) of section 516 of the Family Court Act. Without such notice, the court was without power to approve an agreement or compromise in a paternity proceeding and consequently the support order of Dec. 30, 1969, must be deemed void and should be vacated.

"Since it is evident that the agreement of appellant to admit paternity was part and parcel of a single transaction, we believe that he should be permitted to withdraw said admission of paternity, that the order of filiation should be vacated and that appellant should be restored to his original position."

The petitioner prays that this Court will agree that the case of *Cohen* v. *Berlin, supra,* is both factually and legally on point with the facts before the Court. It is the contract that is at issue here—not maintenance for illegitimate children. If the contract is not to be literally enforced, then it should be set aside and the parties restored to their original position before the signing. No irreparable injury will result. Raymond will be

afforded the opportunity to defend himself and Margie will have her chance to prove paternity. More than that, the sanctity of basic contract law will remain intact.

The Fourteenth Amendment to our United States Constitution affords each of us the due process and equal protection of our laws and further provides that a person's property may not be taken from him without due process of law, which due process it would seem should include the equal protection in the Courts that are interpreting contractual obligations between litigants. By a reading of the Kentucky Supreme Court's decision of October 29, 1976, the petitioner seems to be penalized for complying with his portion of the Agreed Order and the respondent seems to be condoned for her breaching of the contract.

Moreover, by this present decision, the Kentucky Court is sending out a message to all future defendants in paternity actions that if they enter into any maintenance agreement, they do so at their peril. But what of Raymond—no such message was available to him on January 18, 1974 when he signed the Agreed Order in Juvenile Court. Is he not as entitled to a Court's protection as any future litigant, particularly since he was not the offending party to the breach of the contract.

As far back in legal history as 1819, this Court has upheld the sanctity of contracts, when Chief Justice John Marshall decreed that contracts could not be summarily broken, once they were agreed to between the parties. *Trustees of Dartmouth College* v. *Woodward,* 4 Wheaton 518.

CONCLUSION

Raymond Mayfield does now realize that the Agreed Order like the one of January 18, 1974 cannot stand, as such, because the basic rights of the children are not taken into consideration. However, that concept is not at issue here. By that specific agreement he compromised his rights in return for an agreement to forever finalize litigation which was pending against him, only to find out, less than one year later, that the very instrument of compromise was being welded against him to further litigation, and in the process his constitutional guarantees were being violated. It is for this reason that he petitions this Honorable Court to restore those rights to him which were denied by the Kentucky Courts.

The petitioner believes that the question presented by this Petition is of such importance to the proper administration of justice that this Court should accept jurisdiction and issue a Writ of Certiorari to review the Opinion of the Supreme Court of the Commonwealth of Kentucky.

Respectfully submitted,

JOSEPH G. GLASS
118 South Fifth Street
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: OCTOBER 29, 1976

File No. 76-415

RAYMOND MAYFIELD - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY ON RELATION OF
MARGIE R. PHELPS - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Earl O'Bannon, Judge
Civil Action No. 194635

OPINION OF THE COURT BY JUSTICE JONES—AFFIRMING

The question presented by this case is whether the trial court erred in refusing to render ineffective an agreement of paternity and support executed by Raymond Mayfield and Margie Phelps.

This appeal involves a judgment increasing child support payments for a child born out of wedlock to Margie Phelps.

In a paternity action in the juvenile court, Raymond and Margie entered into an agreement approved by the judge. Raymond *acknowledged paternity of the child* and agreed to pay $10.00 per week for its' support. Margie agreed to

"forbear continued proceedings . . . but in the event of defendant's failure to fulfill the obligations of this agreed order, plaintiff retains the right to pursue a satisfactory remedy in this action."

Margie sought to increase the award in juvenile court. The commissioner denied an increase on the basis there was no showing of changed circumstances.

Margie appealed to circuit court. The trial court ordered the award increased to $25.00 per week. From that judgment Raymond prosecutes this appeal.

Raymond contends that the agreed order of January 4, 1974 is a contract between the parties that is not subject to modification. He advances a novel argument that Margie's effort to modify the child support provision breached the agreement. He contends that such breach requires the agreement be rendered ineffective. Raymond's theory for such action is based on that part of the agreement where Margie agreed to "forbear continued proceedings" as long as he paid the $10.00 per week.

Raymond's argument is unacceptable to this court. His theory of the case is not supported by the law. Furthermore, his contention that the formal adjudication of paternity be rendered ineffective is contrary to public policy. Raymond and Margie cannot by this agreement relinquish the rights of the child, who is not a party to the contract. In this jurisdiction, the law recognizes no distinction in the rights of children to support whether the child is legitimate of divorced parents or the illegitimate child of admitted parents. The father of a child born out of wedlock has the same duty of support as the father of a child born in wedlock. Raymond Mayfield is the admitted father of the child. He is subject to the duties in regard to her support imposed by KRS 406.011.

This court is of the opinion that the judgment should be and it is affirmed.

All concur.

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COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

Raymond Mayfield

	File No.	76-415	Appeal From	Jefferson
VS.	Opinion Rendered	October 29, 1976	Circuit Court Action No.	CR# 194635

Commonwealth of Kentucky on Relation of Margie R. Phelps

The COurt being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

March 11, 1977 Appellant's Petition for Rehearing Denied.

A Copy - Attest:

Issued March 11, 1977

MARTHA LAYNE COLLINS, CLERK

Supreme Court, U. S.
FILED
JUN 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Ex Rel. MARGIE R. PHELPS - - Respondent

On Petition for a Writ of Certiorari to the
Kentucky Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY,
Ex Rel. MARG'E R. PHELPS - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Supreme Court, 546 S. W. 2d 433 is correctly set forth in Appendix A of the petitioner's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction for the Petition for Writ of Certiorari to the Kentucky Supreme Court was properly invoked by the petitioner under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the decision of the Kentucky Courts, in refusing to vitiate an Agreement of Paternity and Support, entered into by the petitioner and respondent denies to the petitioner certain rights guaranteed him under the Fourteenth Amendment to the United States Constitution, which denounces the taking of property without due process of law and further denounces the failure to provide persons with equal protection of the laws.

CONSTITUTIONAL PROVISION INVOLVED

The petitioner correctly stated the Constitutional provision involved and is to be found on page 2 of petitioner's petition for Writ of Certiorari.

STATEMENT OF THE CASE

The respondent accepts, as being substantially correct, the petitioner's Statement of the Case, which is found at pages 3-4 of petitioner's Petition for Writ of Certiorari.

ARGUMENT

1. Whether This Court Should Undertake to Hear This Matter Since the Question Raised in This Appeal Was Not Decided by the Court Below.

The record will show that the petitioner first raised the issue, which is the basis for his contention of Jurisdiction, in his Petition for Rehearing to the Kentucky Supreme Court. In a seven page brief supporting the Petition for Rehearing, petitioner, on page 7 of that brief, states his sole basis for bringing this matter to this Court, as follows:

> The Fourteenth Amendment to our United States Constitution affords each of us the due process and equal protection of our laws. Further the Fifth Amendment of that same Constitution provides that a person's property may not be taken from him without due process of law, which due process it would seem should include the equal protection of the Court's in interpreting contractual obligations between the parties. By a reading of this Court's decision of October 29, 1976, Raymond seems to be penalized for complying with his portion of the agreement and Margie seems to be condoned for breaching the agreement.

Petitioner's contention of a constitutional question is very sketchy. The contention was neither argued by petitioner nor commented upon by that Court.

Further, the record will show that at no time previous to petitioner's Petition for Rehearing to the Kentucky Supreme Court was a Constitutional question either expressly contended or implied. This would

include the record of two Jefferson Circuit Court Commissioner hearing reports, the findings and order of the Jefferson Circuit Court and the petitioner's filings to the Kentucky Supreme Court and that Court's Mandate.

This Court has long held that it will not undertake to review what the Court below did not decide in *Walters* v. *City of St. Louis, et al.*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954). Since the constitutional contention in this matter is well within the jurisdiction of the Kentucky Supreme Court to decide, it appears that the Court included in its findings, by implication, that raising a constitutional question as a last minute appeal was not timely. Further, the record in this matter will clearly show that the matter has been subjected to numerous hearings and it is equally clear that petitioner both has had ample opportunity to present any constitutional questions in Kentucky and that petitioner has been afforded due process throughout the proceeding.

Respondent contends that the record in this matter shows that all questions before the Court have been completely exhausted and the writ should be denied.

2. Whether This Court Should Undertake to Hear This Matter Since the Issues Raised in This Appeal, Which Have Been Decided by the Court Below, Have Been Completely Exhausted.

The respondent, in addition to her contention that the writ should be denied because the constitutional

question raised herein has not been raised below, also responds to the arguments contained in the petition.

Petitioner reasons that the Agreed Order of January 18, 1974 was a contract between petitioner and respondent whereby through compromise petitioner admitted paternity in consideration of continuing child support in the modest sum of $10.00 weekly. Respondent continues to argue that petitioner and respondent were only free to contract regarding matters affecting themselves. They were not free to contract away the rights and opportunities of the infant child, Mia Geneen Phelps, and were not free to agree among themselves what their mutual and separate obligations to the child would be. In agreeing with respondent, the Kentucky Supreme Court had knowledge that it is also settled in other jurisdictions that parties to such agreements cannot negotiate away the rights of a party who is not a party to the agreement, specifically, the infant child Mia Geneen Phelps. *Walker* v. *Walker*, Fla., 266 So. 2d 385 (1972); *State* v. *Bowen*, Wash., 498 P. 2d 877 (1977).

Petitioner argues that the Court has granted to Respondent the best of all possible worlds by permitting her to modify an agreement while at the same time requiring that petitioner maintain his admission of paternity. Petitioner conveniently overlooks the above argument. Respondent argues that based upon petitioner's admission, the infant child has every right to rely upon it and, through her custodial parent Margie Phelps, to employ the provisions of Kentucky Revised Statutes § 406.011, which entitled her to the

same treatment from her illegitimate father as she might expect from a father of a legitimate marriage. Kentucky law clearly provides for such modification in both cases, through Kentucky Revised Statutes § 406.011 and *Renick* v. *Renick,* Ky., 57 S. W. 2d 663 (1973); *Richey* v. *Richey,* Ky., 389 S. W. 2d 914 (1965); *Warner* v. *Ward,* Ky., 401 S. W. 2d 62 (1966).

Petitioner relies upon the Agreed Order of September 15, 1973 to support his contention that he has not been afforded equal protection under the law. A review of this agreement will support a contrary conclusion.

MARGIE R. PHELPS - - - - *Plaintiff*

v.

RAYMOND MAYFIELD - - - *Defendant*

AGREED ORDER

• • •

Comes the Plaintiff, Margie R. Phelps, in person and by counsel, Walter J. Swyers, Jr., and the Respondent, Raymond Mayfield, in person and by counsel, Cecil A. Blye, Sr., and it is agreed as follows:

1. That Defendant is the father of Mia Janeen Phelps, born to Plaintiff, September 15, 1973, in Louisville, Jefferson County, Kentucky.

2. That Plaintiff has, and shall continue to have, exclusive custody of said Mia Janeen Phelps.

3. That Defendant agrees to pay or cause to be paid to this Court the sum of $10.00 per week

for care, support and education of said Mia Janeen Phelps from September 15, 1973 until further order of this Court. The amount of arrearage from September 15, 1973 until the date of this Agreed Order shall be paid by Defendant to Plaintiff, in lump sum, on the date of this Agreed Order, or within 60 days therefrom.

4. That Plaintiff agrees to forebear continued proceedings in this action, but, in the event of Defendant's failure to fulfill obligations of this Agreed Order, Plaintiff retains the right to pursue a satisfactory remedy in this action.

/s/ _____
JOSEPH RAY

1-18-74
DATE

Agreed to:

/s/ _____
Margie R. Phelps,
Plaintiff

/s/ _____
Walter J. Swyers, Jr.
Attorney for Plaintiff

/s/ _____
Raymond Mayfield,
Defendant

/s/ _____
Cecil A. Blye, Sr.
Attorney for Defendant

Paragraph 1 is the straightforward admission of paternity.

Paragraph 2 deals with custody of child.

Paragraph 3 deals with child support. It states an amount, it identifies the Court as payee, it states the purpose of the child support and it states the phrase *until further order of this Court.* It is clear that the italized phrase addresses the question of child support, only, because it is confined to the subject matter contained in Paragraph 3. Further, in Kentucky the *Renick* case and the *Richey* case, *supra,* recognize the phrase *until further order of this Court* as a phrase which provides for modification of child support. The agreement, then, expressly provides for modification of child support.

Paragraph 4 of the Agreed Order states that respondent agrees to forebear continued proceedings but has the right to pursue a satisfactory remedy in the event that petitioner fails to fulfill his obligations. Nowhere does Paragraph 4 qualify the expression contained in Paragraph 3 which clearly grants, through respondent, the right to modify child support. The meaning of Paragraph 4, with equal clarity, states that respondent agrees to forebear continued proceedings, so long as paternity is admitted, the arrearage is paid and child support payments be maintained, in whatever amount that be. There is no conflict between the paragraphs of this agreement by any reasonable interpretation.

Petitioner relies heavily upon his contention that New York law, through *Cohen* v. *Berlin,* 37 A. D. 2d 567, 323 N. Y. Supp. 2d 815, supports his argument. Petitioner states that the cases are alike in that the *Cohen* case involves an admission of paternity which

was vacated when the custodial parent sought a child support increase, which increase was not envisioned by an agreement between the parties. This simply is not true. The *Cohen* case is a landmark due process case in New York, but the due process question was raised clearly because the parties had failed initially at the time of the Agreed Order to give notice to public welfare officials as required by New York statute, therefore, the original agreement failed because due process was not respected. That original agreement was vacated, *ab initio.* The case simply has nothing to do with the merits of the instant case but only involves a similar fact situation. The New York case deals with an Agreed Order being void *ab initio* because due process requirements were not respected at the outset. The instant case concerns a contention of a later breach of an existing contract in the interest of a third party. All due process rights were respected in the later case.

The questions raised by petitioner have been exhausted through the appellate process provided in Kentucky. The case has been heard and reheard. The Kentucky Supreme Court has rendered a Mandate supporting respondent's contention, consistent with Kentucky law.

CONCLUSION

Petitioner has based this petition for Writ of Certiorari upon an issue which was not decided by the Courts below. Petitioner only raised the issue of a constitutional question by modest and vague reference in his Petition for Rehearing to the Kentucky Supreme Court.

The arguments presented by petitioner have been exhaustively expounded in Kentucky and the matter was afforded due process through its Courts. The decision for respondent in Kentucky squares with Kentucky law.

The question regarding the child support rights of illegitimate children does not compel a national forum. The rights of individuals are well established by this Court and states are rendering Mandates consistent with such national law, as evidenced by the Kentucky Supreme Court Mandate in this matter. This matter need not be heard.

Respondent respectfully petitions the Court to deny the petition for Writ of Certiorari in this matter.

Respectfully submitted,

WALTER J. SWYERS, JR.
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110 North Sixth Street
Louisville, Kentucky 40202
Counsel for Respondent

Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - Petitioner

VERSUS

COMMONWEALTH OF KENTUCKY, Ex. Rel.
MARGIE R. PHELPS - - - - Respondent

On Petition for a Writ of Certiorari to the
Kentucky Supreme Court

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, EX. REL.
MARGIE R. PHELPS - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

May it please the Court:

PURPOSE OF THE BRIEF

The purpose of the petitioner's Reply Brief is to bring to the attention of the Court, what petitioner believes is, an apparent misconception of fact and law contained in respondent's Brief in Opposition.

PETITIONER'S REPLY

The respondent, in her Brief in Opposition, has taken issue with the fact that the constitutional question presented to this Court was raised belatedly before the Kentucky Courts. More particularly, the respondent at page 3 of her Brief, has indicated that the constitutional question was not raised by the petitioner until he filed his Petition for Rehearing before the Kentucky Supreme Court. That contention is somewhat true as far as it goes. By that, petitioner means that the identification of the Fifth and Fourteenth Amendments to our United States Constitution were first mentioned in the Petition for Rehearing to the Kentucky Supreme Court, but as the respondent concedes at page 4 of her Brief, "the record in this matter shows that all questions before the Court have been completely exhausted." The questions of equal protection and due process of law have been both implicit and explicit throughout these proceedings in the Courts below as respondent's statement indicates, as does the language of her second postulated issue in the case, which may be found on page 4 of her Brief. Even if the respondent's contentions were substantially correct, this Court has long recognized that federal questions can be raised at the Petition for Rehearing stage, and the petitioner calls the Court's attention to *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, 74 L.Ed. 1119, 50 S. Ct. 451, (1930) for a case on that point.

Additionally, the respondent has taken issue with the petitioner's interpretation of *Cohen* v. *Berlin*, 37

A. D. (2d) 567, 323 N. Y. Supp. (2d) 815. The petitioner will not restate that case, since he quoted the short opinion in its entirety in his original Petition, but will reiterate that the New York Courts concluded that the Cohen Agreement was believed to have been entered into as a single transaction, and because it subsequently involved other litigation, that Court vacated the order of filiation and thereafter restored the parties to their original positions. This relief is of the type that Raymond Mayfield is praying for from this Court, as he previously prayed from the Courts below. The petitioner believes that the opinions of the New York Courts and the Kentucky Courts are juxtaposed, and further believes that only this Court can resolve that conflict between the decisions of the respective states involved.

For some reason, both respondent and the Kentucky Supreme Court appear to believe that this case exclusively involves the rights of illegitimate children. More particularly, some moment has been spent by both discussing the fact that illegitimate children have the same rights as legitimate children. If this Court will pardon the play on words, this latter issue has never been at issue during any of the proceedings of this case. The petitioner has always been cognizant of the fact that the rights of legitimate children and illegitimate children are virtually the same and has so stated to the Kentucky Court as he did to this Court on page 4 of his original Petition.

The question before this Court, and the question before the Kentucky Courts, involves the rights of men,

who through compromise and negotiation, agree to a filiation order, such as the one in this case, that ostensibly finalizes litigation, only to learn subsequently that they are going to be brought before the Court time and time again on the basis of the very instrument that they originally thought concluded their litigation. This contractual question is all that is being placed before this Court for decision.

CONCLUSION

The petitioner does realize that the concepts discussed in this Reply are, perhaps, very similar to those first mentioned in his original Petition. However, because the respondent raised the issues involving the constitutional question and the rights of children, the petitioner felt compelled to readdress himself to these points. The petitioner believes that his question is properly before this Court, and further believes that this Court should accept jurisdiction and thereafter issue a Writ of Certiorari to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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